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A SUMMARY
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A SUMMARY

OF THE

LAW OF COMPANIES.

By T. EUSTACE SMITH,

STUDENT OF THE INNER TEMPLE.

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PREFACE.

As an articled clerk reading for the "Final" examination of the Incorporated Law Society, I felt the need of some small book to give the main principles of the law relating to joint stock companies; more particularly as this important branch of mercantile law lies outside the scope of the text books ordinarily used by students. The text books on companies are so large, and the Companies Acts themselves so long, that the Student cannot gain even the most general knowledge of company law without devoting to it more time than, as a rule, he can safely spare from other subjects. With a view to meet this want, I have prepared the following pages, and have endeavoured in them, as briefly and concisely as possible, to give a general view both of the principles and practice of the law affecting companies.

I also hope that this small work may be of use to the general reader, and for this purpose I have carefully given an authority for every statement I have made, in order that it may not only form an epitome of the Companies Acts, but also a ready index, showing where fuller information may be obtained on any point—either from the Acts themselves or the larger text books.

T. EUSTACE SMITH.

May, 1878.

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A SUMMARY

OF THE

LAW OF COMPANIES.

CHAPTER I.

OF THE DIFFERENT KINDS OF JOINT STOCK COMPANIES.

COMPANIES as they originally existed were of two kinds only; (1) incorporated, or those which had been formed into corporations, and (2) unincorporated.

Advantages of incorporated over unincorporated companies.

Incorporated companies had this great advantage over unincorporated, that while a corporation was considered as a distinct individual, able to sue and liable to be sued by its own members, an unincorporated company was considered by the law as an ordinary partnership, and its members, however great its size, were governed by the same rules as partners generally. Another great advantage a corporation had over an unincorporated company was that the property of the corporation and not that of its members was liable for its debts.

Corporations can be created either by Royal Charter, conferred by letters patent, or by Act of Parliament, and these were originally the only methods, by which persons desirous of associating together for purposes of profit could escape the ordinary incidents and liabilities of partnership. As the numbers and importance of companies increased, various Acts of Parliament were passed providing other, and less expensive ways for the formation of joint stock companies, but as these, with a few exceptions presently referred to, have been repealed and new enactments made by the Companies Act, 1862,[1] as amended by the Companies Act, 1867,[2] it is unnecessary to refer to them at length.

A joint stock company has been defined as "an association of individuals for purposes of profit, possessing a common capital contributed by the members composing it, such capital being commonly divided into shares, of which each possesses one or more, and which are transferable by the owner."[3]

Joint stock companies may be divided into two great classes.

1. Those not formed under the Companies Act, 1862.
2. Those formed under that Act.

---

[1] 25 & 26 Vict. c. 89.

[2] 30 & 31 Vict. c. 131.

[3] Shelford's Joint Stock Companies Acts, p. 1.

The former of these classes may be divided as follows :—

1. Cost Book Mining Companies.
2. Companies incorporated or privileged by the Crown.
3. Companies incorporated by some special Act of Parliament.
4. Banking companies formed under 7 Geo. IV. c. 46.

1. *Cost Book Mining Companies.*

Cost book mining companies.

These are companies governed by local custom, and it appears doubtful whether they can be formed for working mines beyond the jurisdiction of the Stannaries. They are mere partnerships, and the members are governed by the general law relating to partners, except so far as that law is expressly excluded by the custom. The company is formed by the agreement together of a number of adventurers who agree to share the risk and expense of working a lode. The mine is managed by an agent called a "Purser," under the control of the shareholders. The terms of the agreement are entered in a book called the "Cost Book;" in this book are also entered all receipts and payments on behalf of the mine, a list of the members, and all transfers of the shares.[1] The shares are transferable, may be relinquished, and are liable for non-payment of calls.[1] By a recent Act,[2] a past member, who has ceased to be a member for two years or upwards, before the mine ceased to be worked, or before the date of the winding-up order, is not liable to contribute to the assets of the company. Companies within the jurisdiction of the Stannaries are regulated by the Stannaries Act, 1869 (32 & 33 Vict. c. 19).

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[1] Wharton's Law Lexicon.

2. *Companies incorporated or privileged by the Crown.*

Companies incorporated by the Crown.

Firstly. Companies incorporated by the Crown. The Crown has at common law the power of incorporating, by charter, any persons desiring to be incorporated, and a chartered company is therefore formed, as soon as a charter of incorporation is granted to, and accepted by, two or more individuals.[3] A company, when so formed, is not a partnership, and is governed solely by the terms of its charter. Companies may still be formed in this way, but it seems to have fallen into disuse.

Companies privileged by the Crown.

Secondly. Companies privileged by the Crown. By the 7 Will. IV. & 1 Vict. c. 73, the Crown is empowered to grant by letters patent to any company any privileges which the Crown might at common law grant to any company, by any charter of incorporation. A company does not become incorporated by such letters patent. It is required to be entered into by an agreement under seal containing certain provisions specified by the Act.[1] The privileges of a company formed in this way depend on the letters patent, and the members are liable for all debts and liabilities, except so far as their liability is limited by the letters patent. Companies may still be privileged by letters patent, but this method, like the last, appears to have fallen into disuse.[2]

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[1] Lindley on Partnership, 3rd ed.,p. 153.

[2] 32 & 33 Vict. c. 19, s. 25.

[3] Lindley on Partnership, 3rd ed., p. 155

3. *Companies incorporated by special Act of Parliament.*

Companies incorporated by special Act of Parliament.

A company incorporated under any special Act of Parliament exists as an incorporated company, and is regulated by its special Act alone, but companies incorporated since the 8th of May, 1845, are governed by the Companies Clauses Consolidation Act,[3] save so far as its clauses and provisions are expressly varied or exempted by the company's special Act. Companies are frequently at the present day incorporated by special Act of Parliament, and are generally of a public nature, common instances being railway companies.

---

[1] 7 Will. IV. & 1 Vict. c. 73, s. 5.

[2] Shelford's Joint Stock Companies Acts, p. 388.

[3] 8 & 9 Vict. c. 16, amended by 26 & 27 Vict. c. 118, and 32 & 33 Vict. c. 48.

4. *Banking Companies formed under* 7 *Geo. IV.* c. 46.

All banking companies regulated by this Act must have been formed before the year 1844.[1] It is still in force as to companies formed before the 6th of May, 1844, and not registered under the Companies Act, 1862.[2] These companies, although partnerships, possess many privileges which ordinary partnerships do not, the principal of which is the right of suing and being sued in the name of some Public Officer. These privileges were acquired and are retained by sending to the Stamp Office once a year, between the 28th of February and 25th of March, a return of—(1.) The name of the company; (2.) The names and addresses of the members; (3.) The name of every bank established by it; (4.) The names and addresses of two or more persons members of the co-partnership resident in England, together with their titles of office, who have been appointed Public Officers of the company; (5.) The name of every town and place where any bills or notes are issued. These returns must be verified by the oath of one of the registered Public Officers.

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[1] 7 & 8 Vict. c. 110.

[2] *Post*, p. 19.

With regard to the second division of joint stock companies, viz., those formed under the Companies Act, 1862, these are by far the most numerous and important, and to them the bulk of these pages will be devoted.

CHAPTER II.

OF THE FORMATION OF A COMPANY UNDER THE COMPANIES ACT, 1862, AND MATTERS INCIDENTAL THERETO, AND THE APPLICATION OF THAT ACT TO COMPANIES NOT FORMED UNDER IT.

THE Companies Act, 1862, provides for the formation of three different kinds of companies, viz :—

1. Companies limited by shares.
2. Companies limited by guarantee.
3. Unlimited companies.

The chief distinction between these three classes of companies is in the liability of the members. Their liability in the first case is limited to the amount unpaid on their shares.[1] In the second case to the amount which each has undertaken by the memorandum of association to contribute to the assets of the company in the event of its being wound up,[2] and in the third case the liability of the members is unlimited.[3] There are, however, various other distinctions, which will be noticed further on.

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[1] The Companies Act, 1862, s. 7.

[2] *Ibid.*

[3] The Companies Act, 1862, s. 10.

Number of persons required to form a company.

The smallest number of persons who can form a company is seven,[1] and no partnership of more than twenty persons can be formed for the purpose of carrying on any business, that has for its object the acquisition of gain, by the partnership, or by its members, unless it is registered as a company under the Companies Act, 1862, or is formed in pursuance of some other Act of Parliament, or is a company engaged in working mines within and subject to the jurisdiction of the Stannaries.[2] Banking partnerships in this respect are on a peculiar footing, as they must be registered if the number of partners exceeds ten,[3] and any banking company claiming to issue notes in the United Kingdom is not entitled to limited liability in respect of such issue,[4] and the members are liable for the whole amount of the issue in addition to the sum for which they are liable on their shares or guarantee.

Banking companies.

Promoters.

The persons originally forming a company are called the promoters, and their first step, is usually the publication of a prospectus, as to which it may be noticed that a promoter will be liable to make good to an allottee of shares, any damage which he may have sustained by taking shares on the faith of an untrue statement;[5] and if the objects for

Prospectus.

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[1] The Companies Act, 1862, s. 6.

[2] *Ibid.* s. 4.

[3] *Ibid.*

[4] The Companies Act, 1862, s. 182.

[5] As to what amounts to a misrepresentation, see *Gerhard* v. *Bates*, 2 Ell. & Bl. 476.

which the company is formed differ in the memorandum of association from the prospectus, any person who has agreed to take shares will not be liable as a shareholder.[1] Every prospectus of a company, and every notice inviting persons to subscribe for shares, must specify the dates and the names of the parties to any contract entered into by the company, or the promoters, directors, or trustees thereof, before the issue of such prospectus or notice, whether subject to adoption by the directors or trustees or otherwise; or such prospectus or notice will be deemed fraudulent on the part of the promoters, directors, and officers of the company, knowingly issuing the same, as regards any person taking shares in the company, on the faith of the prospectus, unless he had notice of such contract.[2] The next step is the preparation of the memorandum of association. This is a memorandum containing particulars of the company, which is required to be registered with the registrar of joint stock companies; the requisites which it must contain differ according to the class to which the company belongs.

Contracts entered into by the company or promoters.

Memorandum of association.

Where the company is limited by shares, these requisites are:

1. The name of the proposed company, with the addition of the word "limited" as the last word in such name.

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[1] *Fox* v. *Clifton,* 6 Bing. 776.

[2] The Companies Act, 1867, s. 38.

2. Where the registered office is to be situated.
3. The objects of the company.
4. A declaration that the liability of the company is limited.
5. The amount of capital and the shares into which it is divided.

Subject to the following regulations:

1. That no subscriber shall take less than one share.
2. That each subscriber of the memorandum of association shall write opposite to his name the number of shares he takes.[1]

Where the company is limited by guarantee its memorandum of association must contain the first three of the last-mentioned requisites, and

4. A declaration that each member undertakes to contribute to the assets of the company, in the event of the same being wound up during the time that he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before the time at which he ceases to be a member, and of the costs, charges, and expenses of winding-up the company, and for the adjustment of the rights of the contributories amongst them-

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[1] The Companies Act, 1862, s. 8.

selves, such amount as may be required not exceeding a specified amount.[1]

Where the company is unlimited the memorandum of association need only contain the first three requisites of a company limited by shares.[2]

The memorandum of association may, in the case of a company limited by shares, and must, in the case of a company limited by guarantee or unlimited, be accompanied, when registered, by articles of association. The articles of association contain the rules and regulations, and specify the mode of conducting business, the number and qualifications of the directors, and generally the whole internal organization of the company. They must be in separate paragraphs numbered arithmetically,[3] must be printed, and a sum of *5s.* is payable on their registration. The schedule to the Act contains a table (marked "A") of provisions, all or any of which may be adopted in the articles of association.[4] In the case of a company limited by shares, if it has no articles of association, or where it has articles of association, so far as the provisions of the table are not excluded or modified by them, Table "A" is to be deemed to be the regulations of the company.[5] Both the memorandum and articles of association bear a 10*s.* stamp, and must be

Articles of association.

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[1] The Companies Act, 1862, s. 9.

[2] *Ibid.* s. 10.

[3] *Ibid.* s. 14.

[4] The Companies Act, 1862, s. 14.

[5] *Ibid.* s. 15.

signed by each subscriber, in the presence of and attested by one witness at least, and when registered, bind the company and the members thereof, to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were therein contained a covenant on the part of himself, his heirs, executors, and administrators, to observe all the conditions of the memorandum, and to conform to all the regulations contained in the articles subject to the provisions of the Act.[1] All monies payable by any members to the company in pursuance of the conditions and regulations of the company are deemed to be a debt due from such member to the company in the nature of a specialty debt.[2] The memorandum and articles of association must be delivered to the registrar of joint stock companies, who registers them,[3] upon payment of fees varying, in the case of a company having its capital divided into shares, with the amount of its capital, and in the case of a company not having its capital divided into shares, with the number of its members.[4] Upon registration the company becomes incorporated with power to hold lands. The certificate of the incorporation of any company given by the registrar is conclusive evidence that all the requisitions of the Act in respect of registration have been complied with.[1] By the Companies Act, 1877,[2] any certificate of the incorporation of any company given by the registrar or assistant registrar is to be received in evidence as if it were the original certificate; and any copy of or extract from any of the documents or part of the documents kept and registered at any of the offices for the registration of joint stock companies, if duly certified to be a true copy under the hand of the registrar or one of the assistant registrars for the time being, and whom it shall not be necessary to prove to be the registrar or assistant registrar, shall in all legal proceedings whatsoever be received in evidence as of equal validity with the original document.

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[1] The Companies Act, 1862, ss. 11 and 16.

[2] *Ibid.* s. 16.

[3] The Companies Act, 1862, s. 17.

[4] *Ibid.* Schedule 1, Table B.

The definition of the objects of the company in the memorandum of association requires particular attention, and they should be described sufficiently broadly to include every business which the company is likely to be engaged in, as there is no power in the Act to alter the memorandum of association so as to extend the scope of the company. The registered office may, however, be changed by notice given to the registrar of joint stock companies, and the memorandum of association may be altered in the following particulars :—

Alteration of registered office.

1. The registered office. By notice to the registrar of joint stock companies.

---

[1] The Companies Act, 1862, s. 18.

[2] The Companies Act, 1877 (40 & 41 Vict. c. 26), s. 6.

2. The name. This can only be done by a special resolution[1] of the company with the approval of the Board of Trade.[2] **Name.**
3. In a limited company the liability of the directors or managers or managing director may, by a special resolution, be made unlimited.[3] **Liability of directors.**

The following only apply to a company limited by shares.

4. A company may increase its capital by the issue of new shares, or consolidate and divide its capital into shares of larger amount, or convert its paid-up shares into stock.[4] Notice of such increase,[5] consolidation, division, or conversion, specifying the shares, must be given to the registrar of joint stock companies.[6] **Increase of capital.**
5. By special resolution a company may reduce its capital[7] (the word capital includes paid-up capital),[8] cancel any lost capital, or pay off any capital in excess of the wants of the company,[8] but no such **Reduction of capital.** **Lost capital.**

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[1] See *post*, p. 32.

[2] The Companies Act, 1862, s. 13.

[3] The Companies Act, 1867, ss. 4—8. See *post*, pp. 30 and 31.

[4] The Companies Act, 1862, s. 12.

[5] The Companies Act, 1862, s. 34.

[6] *Ibid.* s. 28; and see *post*, p. 30.

[7] The Companies Act, 1867, s. 9.

[8] The Companies Act, 1877, s. 3.

resolution can come into force until an order has been made by the Court confirming the reduction.[1] The creditors of the company may object to an order being made for the reduction of the capital,[2] and the words "and reduced" must be added for such time as the Court may fix.[3] Where, however, the reduction of capital does not involve either the diminution of any liability in respect of unpaid capital or the payment to any shareholder of paid-up capital—

Creditors may object.

(*a.*) The creditors are not (unless the Court otherwise directs) entitled to object to the reduction.

(*b.*) The Court may dispense altogether with the addition of the words "and reduced" to the name of the company.[4]

Power to reduce capital by cancellation of unissued shares.

Shares which have not been taken or agreed to be taken may be cancelled without the sanction of the Court.[5]

Shares may be divided into shares of smaller amount.

6. By special resolution a company may divide its capital into shares of a smaller amount; provided the proportion between the

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[1] The Companies Act, 1867, s. 11.

[2] *Ibid.* s. 13.

[3] *Ibid.* s. 10.

[4] The Companies Act, 1877, s. 4.

[5] *Ibid.* s. 5.

amount which is paid, and the amount which is unpaid, on each share, is the same as before the reduction.[1]

In each of these cases it must be remembered that any alteration in the memorandum of association must be authorized by the regulations contained in the articles of association; these may, however, subject to the provisions of the Act and to the conditions contained in the memorandum of association, be altered in general meeting from time to time by special resolution.[2]

Companies formed for the purpose of promoting art, science, literature, religion, charity, or any other object not involving the acquisition of gain by the company or by the individual members thereof, were not considered at common law as partnerships, and such a company may, by the licence of the Board of Trade, be registered with limited liability without the addition of the word "limited" to its name,[3] but cannot, without the sanction of the Board of Trade, hold more than two acres of land; the Board of Trade, may however, by licence under the hand of one of their principal or assistant secretaries, empower any such company to hold lands in such quantity and subject to such conditions as they think fit.[4]

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[1] The Companies Act, 1867, s. 21.

[2] The Companies Act, 1862, s. 50.

[3] The Companies Act, 1867, s. 23.

[4] The Companies Act, 1862, s. 21.

Registered office.

Every company must have a registered office,[1] and must give notice to the registrar of joint stock companies of any change thereof.[2] And every limited company must keep its name painted or affixed on the outside of every office or place in which the business of the company is carried on, and have its name engraved on its seal, and mentioned, in all notices, advertisements, and other official publications of the company, and in all bills of exchange, promissory notes, endorsements, cheques and orders for money or goods, purporting to be signed by or on behalf of the company, and in all bills of parcels, invoices, receipts, and letters of credit of the company.[3] It must also keep a register of all mortgages and charges affecting the property of the company.[4] Every limited banking company, and every insurance company, deposit, provident or benefit society, must, before it commences business, and also on the first Monday in February and the first Monday in August, in every year, make a statement of its capital, liabilities, and assets, in a prescribed form, and a copy of such statement must be put up in a conspicuous place in the registered office of the company, and in every branch or place where the business of the company is carried on.[5]

Name of limited company to be painted up.

Register of mortgages.

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[1] The Companies Act, 1862, s. 39.

[2] *Ibid.* s. 40.

[3] *Ibid.* s. 41.

[4] The Companies Act, 1862, s. 43.

[5] *Ibid.* s. 44.

There are, however, a large number of joint stock companies not formed under the Companies Act, 1862;[1] with regard to these that Act specially provides, that every company consisting of seven[2] or more members, and formed in pursuance of any Act of Parliament, other than the Companies Act, 1862, or otherwise duly constituted by law, may, with one unimportant exception, register under the Companies Act, 1862,[3] and will, when so registered, except in one or two unimportant particulars, be subject to its provisions in the same way as a company formed under the Act.

The one class of companies which may not register under the Act, are mutual companies enjoying limited liability by virtue of Act of Parliament or letters patent:—probably no such company exists; but the reason of excluding them from the privilege of registering, is the inapplicability, to such companies, of the provisions for winding-up.[4] The Companies Act, 1862, also contains provisions for the compulsory winding-up of companies not registered under the Act,[5] such companies cannot be wound up voluntarily[6] or under the supervision of the Court,[7] but only by the Court.[8]

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[1] See *ante*, pp. 3—8.

[2] *Ibid.* p. 9.

[3] The Companies Act, 1862, s. 180.

[4] Thring on Joint Stock Companies, 3rd ed. 199.

[5] The Companies Act, 1862, ss. 199—204.

[6] See *post*, p. 43.

[7] *Ibid.* p. 48.

[8] *Ibid.* p. 35.

As both the registration under the Act, of companies formed in some other way, and the winding-up of unregistered companies seldom occur in practice, they are beyond the scope of a work of this size, and the reader is referred for further particulars on these points to the Acts themselves.

CHAPTER III.

OF THE RIGHTS AND LIABILITIES OF MEMBERS, THE NATURE AND TRANSFERS OF SHARES, THE MANAGEMENT OF A COMPANY, AND A SPECIAL AND EXTRAORDINARY RESOLUTION.

Remedy for improper entry or omission of entry on the register.

EVERY company is required to keep a list of its members, that is, of the persons composing it,[1] and every company having its capital divided into shares is required to forward yearly a list of its members, together with other particulars, to the registrar of joint stock companies.[2] If the name of any person is, without sufficient cause, entered or omitted from the register of members, or if default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member of the company, the person or member aggrieved, or any member of the company, or the company itself may, by motion in any of Her Majesty's Superior Courts of Law or Equity, or by application in Chambers, or to the Vice-Warden of the Stannaries, if the company be under his jurisdiction, or in such other manner as the Court may direct, apply for an order of the Court that the register may be rectified; and the Court may, if satisfied of the justice of the case, make an order for the rectification of the register. The Court may, on any such application, decide on any question relating to the title of any person, who is a party to such proceedings, to have his name entered on or omitted from the register, and generally the Court may, in any such proceedings, decide any question that may be necessary or expedient to decide for the rectification of the register.[1]

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[1] The Companies Act, 1862, s. 23.

[2] The Companies Act, 1862, s. 25.

Misrepresentation. Where any person has been induced by the misrepresentation, either of an individual or of the company, to become a member, his proper course is to proceed against the individual or directors by action, and to make application in the manner before mentioned, to have his name taken off the list of members and for rectification of the register. He must, however, do this before a petition for winding-up the company has been presented, as a contributory in a winding-up under the Act of 1862, cannot plead the fact of his having been induced to take his shares by misrepresentation, as a reason for his being struck off the list of contributories.[2]

Contributories. The term "contributory" means every person liable to contribute to the assets of the company in the event of its being wound up.[3] Contributories are divided into two classes: (1) Present members;

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[1] The Companies Act, 1862, s. 35.

[2] *Oakes* v. *Turquand*, L. R. 2 H. L. 325.

[3] The Companies Act, 1862, s. 74.

(2) Past members. (Past members liable as contributories, are persons who have not ceased to be members for a period of a year or upwards prior to the commencement of the winding-up.) Where the company is limited by shares or guarantee, no contribution can be required from any member exceeding the amount unpaid on his shares or guarantee. The past members are not liable to contribute, until it appears to the Court, that the existing members are unable to satisfy the contributions required from them, and are then not liable for debts contracted since they ceased to be members. In practice the contributories of a company are divided into two classes: (1) the "A" list; (2) the "B" list. The "A" list consists of the present members, *i.e.*, of those who are members of the company at the commencement of the winding-up. The "B" list consists of past members who have ceased to be members within a year before the commencement of the winding-up.[1] The "A" list is settled as early in the winding-up as possible, but it is the uniform practice of the Court not to settle the "B" list until it has been shown that the present members are unable to satisfy the debts.

Past members.

"A" and "B" list of contributors.

The "A" contributories are primarily liable to pay the debts, and must be first individually exhausted before any "B" contributory can be called upon. The liability of a "B" contributory does

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[1] As to the "commencement of the winding-up," see *post*, p. 50.

Liability of "B" contributories.

not arise until all the assets of the company (including the "A" contributions) have been applied in payment *pari passu* of all the debts of the company, and is then limited:

1. In the case of a limited company—To the amount left unpaid on his shares by the corresponding "A" contributory.
2. To such *residuum* of the debts contracted before he ceased to be a member as still remain undischarged.[1]

In the case of successive transfers of shares, although as between themselves, each transferor has a right to be indemnified by his transferee, yet as regards the company, every person who has held the shares within a year before the commencement of the winding-up, is liable to be placed upon the "B" list, and the liquidator may place all such persons upon the list, and come upon any one of them for the calls.[2]

Contracts limiting the liability of the members.

The Act does not invalidate any provision contained in any policy of insurance, or other contract, limiting the liability of individual members, or whereby the funds of the company are alone liable in respect of such policy or contract.

Nature of liability of contributory.

The liability of any person to contribute to the assets of a company, under the Companies Act, 1862, in the event of its being wound-up, creates a debt in the nature of a specialty, accruing due from such person at the time when his liability commenced, but payable at the time or times when calls are made for enforcing such liability; and in the case of the bankruptcy of a contributory proof may be made against his estate for the estimated value of his liability to future calls as well as calls already made.[1]

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[1] Buckley on Joint Stock Companies, 2nd ed., pp. 132—145.

[2] *Kellock* v. *Enthoven*, L. R. 9 Q. B. 241.

Bankruptcy of contributory.

Transfers of shares are frequently made, when a company is threatened with insolvency, for the purpose of getting rid of liability; these are good, even when the transferee is a man of straw, if the whole interest in the shares has been *bonâ fide* parted with, and the transferor will only be liable as a "B" contributory,[2] or if the transfer was made more than one year before the commencement of the winding-up, will escape liability altogether, although he knew at the time the transfer was made that the company was hopelessly insolvent.[3]

Transfers of shares in insolvent companies.

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[1] The Companies Act, 1862, s. 75.

[2] *Ante*, p. 24.

[3] *De Pass's case*, 4 De G. & J. 544; *Slater's case*, 35 Beav. 391; 14 W. R. 446; *Weston's case*, L. R. 4 Ch. 20. Where, however, the company is situated within the jurisdiction of the Stannaries, the rule is different, as the Stannaries Act, 1869 (32 & 33 Vict. c. 19), s. 35, expressly declares that a transfer for the purpose of getting rid of liability for a nominal or no consideration, or to a person without apparent ability to pay the expenses of working a mine, or to a person in the menial or domestic employment of the transferor, shall be presumed to be fraudulent, and need not be recognised by the company or by the Court on the winding-up.

Transmission of shares on death.

On the death of a shareholder his personal representatives, and as the liabilities attaching to shares are debts charged on the real estate by 3 & 4 Will. IV. c. 104, the devisees of his real estate, or heir-at-law, will be liable to be placed on the list of contributories,[1] but as no liability attaches to the real estate until the personal estate is exhausted, the personal representatives should, in strictness, be first placed upon the list, and then if their means are found insufficient to pay the calls, the devisees should be called upon to supply the deficiency, but in order to prevent needless expense, the Court allows both the personal representatives and the heirs and devisees, to be put, at the same time, upon the list of contributories, when the personal estate is obviously insufficient, in order that the case may be proved once for all against both sets of representatives.

On bankruptcy.

In the case of the bankruptcy of a shareholder, his trustee in bankruptcy is placed upon the list, and proof may be made against the bankrupt's estate for the amount of contribution due from him.[2]

On marriage.

The husband of a female shareholder will in the same way be a contributory in respect of her shares, as being liable for her debts, although if she has separate estate, and has contracted on the credit of it, her name will be added to the list in respect of such estate.[3]

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[1] Thring on Joint Stock Companies, 3rd ed., pp. 85, 86.

[2] *Ante*, p. 25.

[3] Thring on Joint Stock Companies, 3rd ed., pp. 86, 87.

Debt owing by company to contributory.

The rights of a contributory with regard to debts owing to him, from the company, vary according to the nature of the debt, and company.

The debt may be :—

1. A debt due to him in his character of member, *e.g.*, for dividends.
2. A debt due to him as an ordinary creditor, *e.g.*, for money advanced..

Debt due to contributory in his character of member.

As regards the first class it is expressly provided[1] that no sum due to any member of the company in his character of member, shall be deemed to be a debt of the company payable to such member in a case of competition between himself and any other creditor not being a member of the company; but any such sum may be taken into account for the purposes of the final adjustment of the rights of contributories amongst themselves.

Debt due to contributory as an ordinary creditor,

in a "limited" company;

in an "unlimited" company.

The rights of the contributory where his debt is of the second class differ in a "limited" and an "unlimited" company.[2] Where the company is limited the contributory cannot set off his debt, but must first pay all claims due from him to the company, and will then be entitled to receive a dividend on his debt with the other creditors;[3] and it makes no difference whether the call was made before or after the order for winding-up.[4] Where the company is "unlimited" the Court may allow the contributory to set off any claim he has against the company against calls made before,[1] or after,[2] the winding-up of the company; an insurance company, whose deed of settlement provided, that the policies should restrict the liability of the shareholders to the amount of their shares of the subscribed capital of the company, has been held to be an "unlimited" company for the purposes of this rule.[3] The reason why this distinction between the members of a "limited" and "unlimited" company is made, is because a member of an "unlimited" company is liable to contribute, to any amount, until all the liabilities of the company are satisfied, and therefore it signifies nothing to the creditors whether a set-off is allowed or not; but with respect to a member of a company with limited liability, if a set-off were allowed against a call, it would have the effect of withdrawing altogether from the creditors, part of the funds applicable to the payment of their debts.[4]

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[1] The Companies Act, 1862, s. 38, ss. 7.

[2] *Ante*, p. 8.

[3] *Grissell's case*, L. R. 1 Ch. Ap. 528.

[4] *Calisher's case*, L. R. 5 Eq. 214.

Reason for distinction.

Shares.

The shares of a company formed under the Companies Act, 1862, are personal estate, and each share, in the case of a company having its capital divided into shares, must be distinguished by its appropriate number.[5] They are not goods, wares, or merchandize, within the 17th section of the Statute of Frauds; so that they do not require a written memorandum for their sale, when the price exceeds £10, and the buyer does not accept and receive any part, nor give something in earnest to bind the bargain, or in part payment.[1] But any contract or agreement for the sale of shares, or stock, or other interest, in any joint stock banking company, is void, unless such contract or agreement sets forth, in writing, the numbers of the shares, stock, or other interest, in the register of the company, or where there is no register, the persons in whose names the shares, stock, or interest, stand as registered proprietors.[2] Previously to the Companies Act, 1867,[3] shares might be paid for in money's worth, as well as money; and vendors, contractors, and other persons, dealing with the company, might be paid, by the allotment to them of fully paid-up shares.[4] This was found to open a door to fraud, and it was accordingly provided by that Act, that every share must be paid for in cash, unless it is otherwise determined by a contract filed with the registrar of joint stock companies.[5] The mode of transfer is governed by the regulations of the company,[6] which usually require a deed. In a company

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[1] The Companies Act, 1862, s. 101.

[2] *Gibbs* and *West's case*, L. R. 10 Eq. 312.

[3] *Ibid.*

[4] Lord Chelmsford in *Grissell's case*, L. R. 1 Ch. Ap. 536.

[5] The Companies Act, 1862, s. 22.

Contracts for sale of shares in Joint Stock Banking Company.

Payment in fully paid-up shares.

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[1] Williams on Personal Property, 8th ed., p. 240.

[2] 30 Vict. c. 29.

[3] 30 & 31 Vict. c. 131.

[4] Thring on Joint Stock Companies, 3rd ed., p. 489.

[5] The Companies Act, 1867, s. 25.

[6] The Companies Act, 1862, s. 22.

limited by shares, warrants may be issued with respect to shares fully paid-up or with respect to stock,[1] and the shares or stock will pass by delivery of the warrant.[2] No trusts can be recorded on the register,[3] and consequently trustees are liable as contributories. Notice of any increase in the capital of a company, or of any consolidation, or division, of its shares, or of conversion of its shares into stock,[4] must be given to the registrar of joint stock companies.[5]

Directors.

The management of the company is usually left to a board of directors; their authority is limited by the memorandum and articles of association, and they are the *particular* not *general* agents of the company,[6] and anyone, third parties, as well as members of the company, are deemed to be acquainted with the instruments creating their authority, and any act of the directors exceeding their limited authority will be void unless it be capable of being, and be sanctioned by the company. As they themselves are agents, the rule *deligatus non potest deligare* is *primâ facie* applicable to them, and their power of acting through agents and binding the company by the acts of their agents is governed entirely by the articles of association. In general their liability is the same as ordinary mem-

Delegation of powers by directors.

Unlimited liability of directors.

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[1] The Companies Act, 1867, s. 27.

[2] *Ibid.* s. 28.

[3] The Companies Act, 1862, s. 30.

[4] *Ante*, p. 15.

[5] The Companies Act, 1862, ss. 28, 34.

[6] Thring on Joint Stock Companies, 3rd ed., p. 112.

bers; it is, however, provided by the Companies Act, 1867,[1] that the liability of the directors of a limited company, may, if so provided by the memorandum of association, as originally prepared, or as altered by special resolution,[2] be unlimited. But even in this case no contribution required from any such director, or manager, is to exceed the amount which he is liable to contribute as an ordinary member, unless the Court deems it necessary to require such contribution, in order to satisfy the debts and liabilities of the company and the costs of winding-up;[3] the liability of a past director, in his character of director, ceases one year after he has given up the office, and he is not liable, in his character of director, in respect of debts or liabilities contracted after the period of his holding office.[4] In addition to this they are personally liable (on the ordinary principles of agency): (1) when they exceed their authority; (2) for any misrepresentation of which they are guilty; and (3) to the company itself for any loss arising from unauthorized investments. In the same way a director signing a promissory note, with nothing in itself to exclude his personal liability, will be personally liable upon it.

When they are personally liable.

With regard to contracts made on behalf of companies, the Companies Act, 1867,[5] provides that companies may be able to contract, by their duly authorised agents, in exactly the same way as individuals, that is: (1) Where the contract is required by law to be in writing, under seal, it must be in writing under the common seal of the company; (2) Where a contract is required by law to be in writing and signed by the parties to be charged therewith, it may be signed by the duly authorised agent of the company; and (3) Where the contract would by law be valid, although by parol only, and not reduced into writing, it may be made by parol by anyone having the express or implied authority of the company to make it; and that the contract may in each case be varied or discharged in the same way as it may be made.

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[1] The Companies Act, 1867, ss. 4—8.

[2] *Post*, p. 32.

[3] The Companies Act, 1867, s. 5, subs. 4.

[4] *Ibid.* s. 5, subs. 2, 3.

[5] 30 & 31 Vict. c. 131, s. 37.

Contracts.

Special resolution.

Definition.

Various things can be done by a company by means of a special resolution,[1] which may be briefly defined as a resolution passed by three-fourths of the members present at a general meeting, of which notice specifying the intention to propose such resolution has been duly given, and confirmed by a subsequent resolution, passed by a majority at a subsequent general meeting, of which notice has been duly given, held at an interval of not less than fourteen days nor more than one month from the date of the first meeting.[2] A copy of every special resolution must be printed, published, and forwarded to the registrar of joint stock companies for registration;[1] and a copy of every special resolution for the time being in force must be annexed to or embodied in every copy of the articles of association issued after the passing of the resolution.[2]

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[1] Amongst others, see *ante*, pp. 15, 16.

[2] The Companies Act, 1862, s. 51.

Extraordinary resolution.

Definition.

Certain things require an extraordinary resolution,[3] which is a resolution passed by three-fourths of the members present at a general meeting, of which notice specifying the intention to propose such resolution has been duly given, but needs no confirmation.[4] In other words, an extraordinary resolution is the first step of a special resolution. Unless a poll is demanded by at least five members, the declaration of the chairman that any resolution has been carried is to be deemed conclusive evidence of the fact. Where a poll is demanded, in computing the majority reference is to be had to the number of the votes to which each member is entitled by the regulations of the company.[5] Voting by proxy will be allowed unless expressly precluded by the articles of association. By the Stamp Act, 1870,[6] proxies for voting are liable to a stamp duty of one penny, and are only available at a specified meeting, or at an adjournment thereof.

Proxies.

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[1] The Companies Act, 1862, s. 53.

[2] *Ibid.* s. 54.

[3] See *post*, p. 44.

[4] The Companies Act, 1862, s. 129.

[5] *Ibid.* s. 51.

[6] 33 & 34 Vict. c. 97, s. 102.

CHAPTER IV.

THE WINDING-UP OF JOINT STOCK COMPANIES.

THE Chancery Division of the High Court of Justice has jurisdiction over the winding-up of all companies registered in England, except companies engaged in working mines within and subject to the jurisdiction of the Stannaries, and these, if the Vice-Warden of the Stannaries certifies, that in his opinion, the company will be more advantageously wound up there, may, too, be wound up by the Chancery Division. But where the Court makes an order for winding-up a company, it may, if it think fit, direct all subsequent proceedings for winding-up the same, to be had in the Court of Bankruptcy, having jurisdiction in the place where the registered office of the company is situated,[1] or in the County Court.[2]

Three kinds of winding-up are provided by the Act :—

1. Winding-up by the Court.
2. Voluntary winding-up.

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[1] The Companies Act, 1862, s. 81.

[2] The Companies Act, 1867, s. 41.

3. Winding-up subject to the supervision of the Court.

The general scheme is the same in all these methods. The *modus operandi* of the Act is to change the directors for officers called "Liquidators," and to give the latter the fullest powers to convert the property of the company into money. This money is then distributed amongst the creditors of the company, and any balance is divided amongst its members. The great distinction between compulsory or winding-up by the Court, and voluntary winding-up, is, that in the first case, the liquidators are officers appointed by, and are agents of, the Court, and if the company is insolvent, are trustees only for the creditors, whereas, in the second class, they are trustees for the company, and the voluntary winding-up need not necessarily imply insolvency, as it is very frequently adopted as a scheme for dissolving the company, for the purpose of changing its objects, or constitution, or of amalgamation with some other company. In the case of a winding-up subject to the supervision of the Court, the liquidators are appointed by the company, but are subject to the control of the Court.

Distinction between compulsory and voluntary winding-up.

It will be as well in the first place to mention the details of each kind of winding-up, and then to consider its general effects.

First, winding-up by the Court.

A company may be wound up by the Court:

1. Whenever the company has passed a special resolution requiring the company to be wound up by the Court:
2. Whenever the company does not commence its business within a year from its incorporation, or suspends its business for the space of a whole year:
3. Whenever its members are reduced in number to less than seven:
4. Whenever the company is unable to pay its debts:
5. Whenever the Court is of opinion that it is just and equitable that the company should be wound up:[1]

As the creditor is precluded from suing the individual members of the company, it was necessary to provide him with a summary method of compelling the company, either to pay his debt or be wound up; it is accordingly provided by a subsequent section, that a company shall be deemed unable to pay its debts:—

1. Whenever a creditor (by assignment or otherwise) to whom the company is indebted, at law or in equity, in a sum exceeding £50, has served on the company, by leaving the same at their registered office, a demand requiring payment of

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The Companies Act, 1862, s. 79.

the sum due, and the company has for three weeks neglected to pay, secure, or compound for the same:

2. Whenever execution or other process, issued on a judgment, decree, or order obtained in any Court against the company, is returned unsatisfied in whole or in part:
3. Whenever it is proved to the satisfaction of the Court that the company is unable to pay its debts.[1]

Petition.

Who may petition.

Any application for the winding-up of a company must be by petition, which may be presented: (1) By the company; (2) By one or more creditors; (3) By one or more contributories of the company, or by all or any of the above parties together or separately.[2] In order, however, to prevent a person buying shares solely for the purpose of presenting a petition for winding-up, it is provided by the Companies Act, 1867,[3] that no contributory shall be capable of presenting a petition for winding-up a company (except in the event of the members being reduced to less than seven[4], unless the shares in respect of which he is a contributory, or some of them, either were originally allotted to him, or have been held by him, and registered in his name, for a period of at least six months, during the eighteen months previous to the commencement of the wind-

Contributory.

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[1] The Companies Act, 1862, s. 80.

[2] *Ibid.* s. 82.

[3] 30 & 31 Vict. c. 131, s. 40.

[4] *Ante*, p. 36.

ing-up, or have devolved upon him through the death of a former holder. But where a share has, during the whole or any part of the six months, been held by or registered in the name of a wife of a contributory, either before or after her marriage, or by or in the name of any trustee or trustees for such wife, or for the contributory, such share is deemed to have been held by andregistered in the name of the contributory. It is not necessary (except where the creditor's right to a winding-up order arises from non-payment of his debt for three weeks after demand[1]) that the petitioning creditor's debt should amount to £50, and the assignee of a debt can petition[2] as though he had been the original creditor. A holder of fully paid-up shares has also been held to be a contributory for the purpose of presenting a petition.[3] Where a petitioner resides out of the jurisdiction he can be compelled to give security for costs.[4] A creditor who has presented a petition, does not become a trustee for the other creditors, and is not bound to bring the petition to a hearing, but, if he proceeds with a petition after an offer has been made to satisfy his debt and costs, he will be liable for all costs incurred after such offer.[5]

Petitioner *dominus litis.*

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[1] *Ante*, p. 36.

[2] *London & Birmingham Alkali Company*, 1 D. F. & J. 257.

[3] *National Savings Bank Association*, L. R. 1 Ch. 574.

[4] *Home Assurance Company*, L. R. 12 Eq. 112. *Ex parte Seidler*, 12 Sim. 106. *Royal Bank of Australia, Ex parte Latta*, 3 De G. & Sm. 186.

[5] Buckley on Joint Stock Companies, 2nd ed., p. 193.

The petition must be verified by affidavit,[1] and must be advertised seven clear days before the hearing, once in the London Gazette, and once at least in two London daily morning papers, in the case of a company whose registered office, or where it has no such office, then whose principal, or last known place of business is or was situate within ten miles from Lincoln's Inn Hall. In the case of any other company, it must be advertised once in the London Gazette, and once at least in two local papers circulating in the district where such registered office, or principal, or last known place of business, is or was situate.

Advertising petition.

The advertisement must state the day on which the petition was presented, and the name and address of the petitioner, and of his solicitor and London agent. Unless presented by the company it must be served at the registered office (if any) of the company, and if no registered office, then at the principal or last known place of business of the company, if any such can be found, upon any member, officer, or servant, of the company there, or in case no such member, officer, or servant can be found there, then by being left at such registered office or principal place of business, or by being served on such member or members as the Court may direct; and every petition for the winding-up of a company subject to the supervision of the Court must be served on the liquidator under the volun-

What it must contain.

Service of petition.

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[1] Gen. Orders, 1862, rule 4.

tary winding-up.[1] All persons served with the petition, and also all contributories and creditors, but apparently no other persons, are entitled to appear on the petition and to support or oppose it.[2] If the application is successful the Court makes a winding-up order. The petitioner's costs are a first charge on the estate, and must be paid in full in priority to all other claims. If the petitioner is a shareholder, and subsequently becomes liable as a contributory in respect of calls in the winding-up, he is entitled to his costs without any set-off from the company for monies due from him in respect of such calls, as the costs are in fact due to his solicitor.[3] Where several petitions are presented under circumstances which justify their presentation, the practice is to make one order on all the petitions, so that each petitioner may obtain his costs.[4] With respect to the costs of persons who appear to support or oppose a petition although not served with it, there appears to be no settled rule. But in the absence of special circumstances the rule appears to be: (1) To allow one set of costs to those contributories, and one set to those creditors who (without being served) appear on the petition and support the view which ultimately prevails, *i.e.*, support a successful or oppose an unsuccessful petition; (2) To give no costs to those who (not being

Costs of petition.

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[1] Gen. Rules of 1862, rules 2, 3.

[2] Lindley on Partnership, 3rd ed., p. 1298.

[3] Buckley, 2nd ed., p. 208.

[4] *Ibid.* p. 210.

served) support an unsuccessful or oppose a successful petition; but (3) To make a petitioner pay the costs of persons who appear to answer and succeed in refuting unfounded charges made against them.[1]

Official liquidators.

An official liquidator is an officer appointed by the Court to realise and distribute the assets of the company. The Court may appoint one person alone to be official liquidator, or several persons to be together official liquidators, and may also determine what security, if any, is to be given by any official liquidator on his appointment.[2] The present practice is to appoint the official liquidator in chambers, but he may be appointed on the hearing of the petition by consent.[3] He may resign, or be removed by the Court, on due cause shown, and any vacancy in the office of an official liquidator may be filled up by the Court.[4] He has power, with the sanction of the Court,—

1. To bring and defend actions:
2. To carry on the business of the company so far as may be necessary for the beneficial winding-up:
3. To sell the property of the company:
4. To execute, in the name of the company, all deeds, receipts, and other documents, and for that purpose to use the company's seal:

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[1] Lindley on Partnership, 3rd ed., p. 1299.

[2] The Companies Act, 1862, s. 92.

[3] Buckley, 2nd ed., p. 219.

[4] The Companies Act, 1862, s. 93.

5. To prove and take dividends in the matter of a bankruptcy or sequestration of a contributory:
6. To draw, accept, and endorse any bill of exchange or promissory note in the name and on behalf of the company; also to raise upon the security of the assets of the company any requisite sum or sums of money:
7. To take out in his official name letters of administration to any deceased contributory, and to do in his official name any other act necessary for obtaining payment of any sum due from a contributory or from his estate, and which cannot be conveniently done in the name of the company:
8. To do and execute all such other acts and things as may be necessary for winding-up the affairs of the company and distributing its assets:[1]

The Court may provide by any order that the official liquidator may exercise any of the above powers without the sanction or intervention of the Court.[2] The official liquidator may, with the sanction of the Court, appoint a solicitor,[3] but in practice it is the invariable rule that a liquidator, who is a solicitor, shall not employ his partner as his solicitor in the winding-up, unless he be willing to act without remuneration.[1] One of the first duties of the official liquidator is to prepare the list of those persons who are liable to contribute to the assets as the present members, or, more technically speaking, to complete the "A" list of contributories;[2] he then obtains an appointment for the list to be settled by the Judge in chambers, and gives four days' notice in writing of such appointment to every person included in the list, and in case any variation or addition to such list shall at any time be made by the official liquidator, a similar notice in writing must be given to every person to whom such variation or addition applies;[3] the list of past members or "B" contributories,[4] is settled, when the "A" list is exhausted, in the same way. The remuneration of the official liquidator is by way of percentage or otherwise as the Court directs,[5] and is paid out of the assets next after the costs of the winding-up.[6]

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[1] The Companies Act, 1862, s. 95.

[2] *Ibid.* s. 96.

[3] The Companies Act, 1862, s. 97.

Settling list of contributories.

Secondly, voluntary winding-up.

A company may be wound up voluntarily:

1. Whenever the period, if any, fixed for the duration of the company by the articles of association expires, or when-

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[1] *Universal Private Telegraph Co.*, 19 W. R. 297.

[2] *Ante*, p. 23.

[3] Gen. Orders, 1862, rules 29, 30.

[4] *Ante*, p. 23.

[5] The Companies Act, 1862, s. 93.

[6] Buckley, 2nd ed., p. 245.

ever the event, if any, occurs, upon the occurrence of which it is provided by the articles of association, that the company is to be dissolved, and the company in general meeting has passed a *resolution* requiring the company to be wound up voluntarily :

2. Whenever the company has passed a *special* resolution requiring the company to be wound up voluntarily:
3. Whenever the company has passed an *extraordinary* resolution[1] to the effect that it has been proved to their satisfaction that the company cannot, by reason of its liabilities, continue its business, or that it is advisable to wind up the same.[2]

Notice of any special or extraordinary resolution passed for winding-up a company voluntarily, must be given by advertisement in the London Gazette.[3]

The following consequences ensue upon the voluntary winding-up of a company:

1. The property of the company is applied in satisfaction of its liabilities *pari passu*, and subject thereto, is (unless it be otherwise provided by the regu-

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[1] As to an extraordinary resolution, see *ante*, p. 33.

[2] The Companies Act, 1862, s. 129.

[3] The Companies Act, 1862, s. 132.

lations of the company) distributed amongst the members according to their rights and interests in the company:

2. Liquidators are appointed and their remuneration fixed by the company in general meeting:
3. Where one person only is appointed, all the provisions in reference to several liquidators apply to him:
4. Upon the appointment of the liquidators, all the powers of the directors cease, except so far as the company in general meeting, or the liquidators, sanction the continuance of such powers:
5. When several liquidators are appointed, every power given by the Act may be exercised by such one or more of them as may be determined at their appointment, or in default of such determination, by any number not less than two:
6. The liquidators may, without the sanction of the Court, exercise all powers by the Act given to the official liquidator:[1]
7. The liquidators exercise the powers given to the Court of settling the list of contributories, and any list so settled is *primâ facie* evidence of the liability

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[1] See *ante*, pp. 41, 42.

of the persons named therein to be contributories:

8. The liquidators may call on all or any of the contributories to the extent of their liability, to pay all or any sum they deem necessary to satisfy the debts and liabilities of the company, and the costs of winding it up, and the liquidators may take into consideration the probability that some of the contributories may partly or wholly fail to pay their respective portions of the same:
9. The liquidators must pay the debts of the company and adjust the rights of the contributories amongst themselves.[1]

A company about to be wound up voluntarily, or in the course of being wound up voluntarily, may, by an extraordinary resolution, delegate to its creditors the power of appointing liquidators and supplying vacancies in their number, or by a like resolution enter into any arrangement with respect to the powers to be exercised by its liquidators.[2]

The liquidators, or any contributory of the company, may apply to the Court to determine any question arising in the winding-up, or to exercise all or any of the powers which the Court might exercise if the company were being wound up by the Court;

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[1] The Companies Act, 1862, s. 133.

[2] The Companies Act, 1862, s. 135.

and the Court may, if satisfied that the determination of such question, or the required exercise of powers, will be just and beneficial, accede wholly or partially to such application on such terms and subject to such conditions as the Court thinks fit.[1]

The liquidators may also from time to time summon general meetings of the company, for the purpose of obtaining the sanction of the company, by special or extraordinary resolution, or for any other purpose they think fit; and in the event of the winding-up continuing more than one year, they must summon a general meeting at the end of the first and each succeeding year, and must lay before such meeting an account showing their acts and dealings, and the manner in which the winding-up has been conducted during the preceding year.[2] Any vacancies in the office of liquidators by death, resignation, or otherwise, may be filled up by the company, in general meeting, subject to any arrangement they have entered into with their creditors.[3] If from any cause there is no liquidator, the Court may, on the application of a contributory, appoint a liquidator. A liquidator in a voluntary winding-up can only be removed by the Court.[4] As soon as the affairs of the company are fully wound up, the liquidators must prepare an account showing how the liquidation has been conducted, and the property of the company disposed of; their next step is to call a general meeting for the purpose of considering the account; the meeting must be called by advertisement, specifying the time, place, and object of the meeting, and must be published for one month at least—previously to the meeting—in the London Gazette.[1] The liquidators must make a return to the registrar of such meeting having been held, and of the date at which the same was held, and at the expiration of three months from the date of the registration of such return the company is deemed to be dissolved.[2] The costs incurred in the voluntary winding-up of a company, including the remuneration of the liquidators, are paid out of the assets of the company in priority to all other claims.[3] Where a company is in the course of being wound up voluntarily, and the Court thinks fit to make an order directing the company to be wound up by the Court, the Court may provide for the adoption of all or any of the proceedings in the voluntary winding-up.[4]

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[1] The Companies Act, 1862, s. 138.

Ibid. s. 139.

[3] The Companies Act, 1862, s. 140. See *ante*, p. 46.

[4] *Ibid.* s. 141.

Thirdly, winding-up subject to the supervision of the Court. This takes place where a company, in the course of voluntary winding-up, has proceedings taken against it for its winding-up by the Court;

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[1] The Companies Act, 1862, s. 142.

[2] *Ibid.* s. 143.

[3] The Companies Act, 1862, s. 144.

[4] *Ibid.* s. 146.

In such a case, the Court may make an order directing that the voluntary winding-up shall continue, but subject to its supervision, and with such liberty for creditors, contributories, or others, to apply to the Court, and generally upon such terms and conditions as the Court thinks just.[1] A petition, praying that a voluntary winding-up may continue subject to the supervision of the Court, is, for the purpose of giving the Court jurisdiction over suits and actions,[2] to be deemed a petition for the winding-up of the company by the Court.[3] The Court may, in all matters relating to the winding-up under supervision, have regard to the wishes of the creditors or contributories, and may direct general meetings of them to be summoned, for the purpose of ascertaining their wishes.[4] An order for winding-up subject to the supervision of the Court usually continues the voluntary liquidators as official liquidators; but the Court may appoint any liquidator or liquidators (in addition to those appointed in the voluntary winding-up), and any liquidators so appointed have the same powers, and are subject to the same obligations, and in all respects stand in the same position, as the liquidators appointed by the company.[5] The liquidators appointed in a winding-up subject to supervision, may, subject to any restrictions imposed by the Court, exercise all their powers without the sanction or intervention of the Court, in the same manner as if the company was being wound up altogether voluntarily.[1] But except, as before mentioned, an order for winding-up a company under the supervision of the Court, is, for all purposes, to be deemed an order of the Court for winding-up the company by the Court.[2]

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[1] The Companies Act, 1862, s. 147.

[2] See *post*, p. 51.

[3] The Companies Act, 1862, s. 148.

[4] *Ibid.* s. 149.

[5] *Ibid.* s. 150.

As to the general effects of winding-up.

Commencement of winding-up.

The winding-up of a company by the Court commences at the time of the presentation of the petition.[3] A voluntary winding-up commences from the time of the passing of the resolution authorizing the winding-up;[4] when however, the resolution is a special resolution, *i.e.*, a preliminary, followed by a confirmatory resolution, the commencement of the winding-up dates from the passing of the confirmatory resolution.[5] Where a voluntary winding-up is continued under supervision, the winding-up commences at the date of the resolution, and not at the date of the presentation of the petition, for this order is to continue the winding-up, which has already commenced.[6] The effect of the winding-up is to put an end to the existence of the company, except for the purpose of the beneficial winding-up

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[1] The Companies Act, 1862, s. 151, and *ante*, pp. 45, 46.

[2] *Ibid.* s. 151.

[3] *Ibid.* s. 84.

[4] The Companies Act, 1862, s. 130.

[5] Buckley, 2nd ed., p. 265.

[6] *Ibid.* p. 266.

Transfers of shares after commencement of winding-up.

of the company. Consequently, in a voluntary winding-up, all transfers of shares, except transfers made by or with the sanction of the liquidators, or alteration in the status of the members of the company, taking place after the commencement of such winding-up, are void;[1] where the company is wound up by the Court or subject to its supervision, all dispositions of the property, effects, and things in action of the company, and every transfer of shares or alteration in the status of the members of the company, made between the commencement of the winding-up and the winding-up order, are void unless the Court otherwise orders.[2]

Restraining proceedings after petition.

The Court may, at any time after the presentation of the petition, and before an order for winding-up a company, upon the application of the company, or of any creditor or contributory of the company, restrain further proceedings in any action, suit, or proceeding, against the company upon such terms as it thinks fit.[3] After an order for winding-up has been made, no suit, action, or proceeding may be proceeded with or commenced against the company, except with the leave of the Court,[4] and any attachment, sequestration, distress, or execution put in force against the estate or effects of the company (without such leave) after the commencement of the winding-up is void.[5] These powers apply to a

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The Companies Act, 1862, s. 131.

[2] *Ibid.* s. 153.

[3] *Ibid.* s. 85.

[4] The Companies Act, 1862, s. 87.

[5] *Ibid.* s. 163.

company being wound up under the supervision of the court,[1] and as the Court may in a voluntary winding-up on the application of the liquidators or a contributory, exercise all or any of the powers which it may exercise if the company is being wound up by the Court,[2] it has, upon such application, power to restrain any proceedings after the commencement of the winding-up, but such proceedings are not *ipso facto* void, as in the case of a winding up by or under the supervision of the Court.

In a voluntary winding-up.

It is a question for the discretion of the Court whether it will allow a creditor to proceed or not, and where a creditor of the company obtains judgment and issues execution *bonâ fide*, and the sheriff is actually in possession before the presentation of the petition, the creditor will not, except under special circumstances, be restrained from realizing his judgment.[3]

Compromising calls and debts.

The liquidators are empowered, with the sanction of the Court, where the company is being wound up by the Court or subject to its supervision, and with the sanction of an extraordinary resolution of the company where it is being voluntarily wound up, to compromise all calls, debts, and claims due to the company from any contributory or debtor, and to give valid discharges for the same.[4]

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[1] The Companies Act, 1862, ss. 148 and 151.

[2] The Companies Act, 1862, s. 138.

[3] Buckley, 2nd ed., p. 198.

[4] The Companies Act, 1862, s. 160.

Arrangements by a company with its creditors.

The Companies Act, 1862, contains powers for companies being wound up to make arrangements or compositions with their creditors, but as a more easy and effectual means has been provided by the Joint Stock Companies Arrangement Act, 1870, it will only be necessary to refer to the provisions of this last Act, which empowers the Court, where any compromise or arrangement is proposed between a company in the course of being wound up and its creditors or any class of its creditors (in whatever way the company is being wound up), on the application of any creditor or the liquidator, to order that a meeting of such creditors be summoned, in such manner as the Court directs, and if a majority in number representing three-fourths in value of the creditors present either in person or by proxy at such meeting, agree to any arrangement or compromise, such arrangement or compromise, if sanctioned by an order of the Court, is binding on all such creditors or class of creditors, and also on the liquidators and contributories of the company.[1]

Liquidators may accept shares, &c., as a consideration for the sale of the company.

One of the most important powers of the liquidators under a voluntary winding-up, or a winding-up under the supervision of the Court, is that of selling the business and goodwill of the company being wound up to another company, in consideration of shares, policies, or other like interests. This power can only be exercised, with the sanction of a special resolution of the company being wound up, but if done with such sanction is binding on the minority. Any dissentient member may, however, by notice in writing addressed to the liquidators, and left at the registered office of the company not later than seven days after the passing of the resolution, require the liquidators, at their option, either to abstain from carrying the resolution into effect, or to purchase his interest.[1]

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[1] 33 & 34 Vict. c. 104, s. 2.

Dissentient shareholder cannot be compelled to take shares.

Novation.

Where the business of one company has been taken over by another, a question frequently arises as to the novation of contracts, or, in other words, how far the creditors have agreed to accept the security of the new company for payment of their debts, and to release the old one. A contract, in order to constitute such a release, need not be in writing, but must be tripartite, the creditor, the original debtor, and the new debtor must all be parties to it, and in such case it is a question of fact whether such agreement has been entered into or not.[2]

Mode of enforcing calls.

Where the company is being wound up by the Court, or under its supervision, there appears to be no necessity for the liquidators to bring an action for the payment of any money due from a contributory, as the Court has power to make an order directing payment to be made by him,[3] and such order has the same effect, and can be enforced in the same way, as any other order of the Chancery Division. In a voluntary winding-up, however, the liquidator's only remedy for the non-payment of calls is by action.[1] The Court has, however, in every case power to arrest a contributory about to abscond.[2]

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[1] The Companies Act, 1862, s. 161.

[2] Buckley on Joint Stock Companies, 2nd ed., p. 310.

[3] The Companies Act, 1862, s. 100; and Gen. Orders, 1862, Form 13.

In a voluntary winding-up.

Arrest of absconding contributory.

Proof of debts.

All debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, are admissible to proof against the company.[3] Servants of the company are not, however, entitled to payment in full of any part of the wages or salary due to them at the date of the winding-up in priority to other creditors.[4] The rule as to a secured creditor formerly was that he was entitled to prove for the whole amount due to him at the time of sending in his claim, and not merely as in bankruptcy for the balance remaining due after realizing or valuing his security.[5] But this rule has been altered by the Judicature Act, 1875,[6] which provides that

Servants.

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[1] Buckley on Joint Stock Companies, 2nd ed., p. 270.

[2] The Companies Act, 1862, s. 118.

[3] *Ibid.* s. 158.

[4] Buckley on Joint Stock Companies, p. 294. The Stannaries Act, 1862 (32 & 33 Vict. c. 19, s. 26), however, provides that the wages of miners, and other labourers employed in a mine within the jurisdiction of the Stannaries, not exceeding three months' wages, shall be paid in full in priority to all other debts.

[5] Buckley on Joint Stock Companies, p. 305.

[6] 38 & 39 Vict. c. 77, s. 10.

in the winding-up of a company the same rules shall be observed, as to the rights of secured and unsecured creditors, as may be in force, for the time being under the law of bankruptcy, with respect to the estates of persons adjudicated bankrupt. It appears from recent decisions that a winding-up order constitutes the official liquidator a trustee for the creditors so as to prevent the Statute of Limitations from barring their debts.[1] The assignee of any chose in action belonging to the company, may bring or defend any action or suit relating to such chose in action in his own name.[2] Any act relating to property which would, if done by or against any individual trader, be deemed, in the event of his bankruptcy, to have been done by way of undue or fraudulent preference of the creditors of such trader is, if made or done by or against any company, deemed, in the event of the company being wound up, to be done by way of undue or fraudulent preference of the creditors of the company, and is invalid accordingly; and for this purpose, the presentation of the petition, in the case of a company being wound up by or subject to the supervision of the Court, and a resolution for winding-up the company in the case of a voluntary winding-up, are deemed to correspond with the act of bankruptcy in the case of an indi-

Fraudulent preference.

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[1] Buckley on Joint Stock Companies, 2nd ed., p. 310.

[2] The Companies Act, 1862, s. 157.

vidual trader; and any conveyance or assignment made by any company of all its estate and effects to trustees for the benefit of all its creditors is void to all intents.[1] The Court can compel any past or present director, liquidator, or officer of a company who has been guilty of any misfeasance or breach of trust (notwithstanding that the offence is one for which the offender is criminally responsible), to repay any monies misapplied or retained by him, together with interest, or to contribute such sums to the assets of the company as the Court thinks fit;[2] and any such person may, by direction of the Court, be prosecuted for any offence of which he has been guilty, and the costs of the prosecution paid out of the assets of the company.[3] In addition to this, any director, officer, or contributory who destroys, mutilates, alters, or falsifies, or makes or is privy to any false or fraudulent entry, in any register or other document, with intent to defraud or deceive any person, is guilty of a misdemeanor, and is liable upon conviction to imprisonment for any term not exceeding two years with or without hard labour.[4]

Delinquent directors and officers.

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[1] The Companies Act, 1862, s. 164.

[2] *Ibid.*

[3] The Companies Act, 1862, s. 165.

[4] *Ibid.* ss. 167, 168.

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Upon the general principles, according to which damages are to be assessed in actions of contract, *Hadley* v. *Baxendale* (9 Ex. 341) still remains the leading authority, and furnishes the text for the discussion contained in the second chapter of Mr. Mayne's book. Properly understood and limited, the rule proposed in that case, although in one respect not very happily worded, is a sound one, and has been repeatedly approved both in England and America. Damages may, according to the judgment of the Court of Exchequer, be recovered if they are such as "may fairly and reasonably be considered as arising either naturally, *i.e.*, according to the usual course of things from the breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it." There is no difficulty as to the first alternative in principle, although sometimes it may not be very easy to estimate the amount of damage. But the second alternative has given rise to much discussion, and it may be doubted whether the rule so expressed is of much service; for, generally speaking, parties contemplate the performance and not the violation of their contracts. The class of cases which it is intended to cover is that in which a contract is made under special circumstances, and damages which would not arise in the usual course of things from a breach do arise from those circumstances. If such circumstances are not known to the party who breaks the contract, it is clear that he is not liable. If they are known, then, according to *Hadley* v. *Baxendale*, he would be liable, since the resulting damage must be held within his contemplation, and so, *in that case*, the natural consequence of the breach. This proposition, however, must now be taken with considerable modification. The subsequent decisions, which are concisely summarized by Mr. Mayne, have established that mere knowledge of special circumstances is not enough, unless it can be inferred from the whole transaction that the contractor consented to become liable to the extra damage. This limitation is obviously just, especially in the case of persons, such as common carriers, who have no option to refuse the contract. Mere knowledge on their part of special circumstances ought not, and, according to the *dicta* of the judges in the Exchequer Chamber in *Horne* v. *Midland Railway Company* (21 W. R. 481, L. R. 8 C. P. 131), would not involve the carrier in additional responsibility. Mr. Mayne's criticism of the numerous cases in which this matter has been considered leaves nothing to be desired, and the rules he deduces therefrom (pp. 32, 33) appear to us to exhaust the subject.

Mr. Mayne's remarks on damages in actions of tort are brief. We agree with him that in such actions the courts are governed by far looser principles than in contracts; indeed, sometimes it is impossible to say they are governed by any principles at all. In actions for injuries to the person or reputation, for example, a judge cannot do more than give a general direction to the jury to give what the facts proved in their judgment required. And, according to the better opinion, they may give damages "for example's sake," and mulct a rich man more heavily than a poor one. In actions for injuries to property, however, "vindictive" or "exemplary" damages cannot, except in very rare cases, be awarded, but must be limited, as in contract, to the actual harm sustained.

The subject of remoteness of damage is treated at considerable length by Mr. Mayne, and we notice that much new matter has been added. Thus the recent case of *Riding* v. *Smith* (24 W. R. 487, 1 Ex. D. 91) furnishes the author with an opportunity of discussing the well-known rule in *Ward* v. *Weeks* (7 Bing. 211) that injury resulting from the repetition of a slander is not actionable. The rule has always seemed to us a strange one, if a man is to be made responsible for the natural consequences of his acts. For every one who utters a slander may be perfectly certain that it will be repeated.

It is needless to comment upon the arrangement of the subjects in this edition, in which no alteration has been made. The editors modestly express a hope that all the English as well as the principal Irish decisions up to the date have been included, and we believe from our own examination that the hope is well founded. We may regret that, warned by the growing bulk of the book, the editors have not included any fresh American cases, but we feel that the omission was unavoidable. We should add that the whole work has been thoroughly revised."—*Solicitors' Journal.*

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